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*Attorneys for Defendants C. R. Bard, Inc. and
Bard Peripheral Vascular, Inc.*

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

IN RE: Bard IVC Filters Products Liability
Litigation,

No. 2:15-MD-02641-DGC

**JOINT MOTION AND
INCORPORATED MEMORANDUM
FOR AN ORDER PROTECTING
ANY ATTORNEY-CLIENT
PRIVILEGE AND WORK
PRODUCT REVEALED DURING
UPCOMING MOTION FOR
PROTECTIVE ORDER**

Defendants C. R. Bard, Inc. and Bard Peripheral Vascular, Inc. (collectively “Bard”) and the plaintiffs hereby jointly move for an order protecting any attorney-client privilege and work product that may be revealed in conjunction with Bard’s upcoming Motion for Protective Order Regarding Discovery of Litigation Consultant’s Report, which Bard will file later this month subject to the Court’s ruling on the instant motion, as follows:

1. On December 15, 2004, Dr. John Lehmann submitted a written report to

1 Bard's Assistant General Counsel, Donna Passero. Bard has asserted that the work-
2 product doctrine protects Dr. Lehmann's report from discovery or other use during the
3 MDL. The plaintiffs argue that Dr. Lehmann's report was created in the normal course of
4 business, and is therefore discoverable and may be used in the prosecution of their cases.
5 Dr. Lehmann's report was also admitted, over Bard's objections, during a trial in February
6 2015.

7 2. Before the creation of this MDL, Bard litigated its work-product assertion in
8 numerous state and federal courts across the country, including in *Alexander v. C. R.*
9 *Bard, Inc.*, which was pending in the U.S. District Court for the Northern District of
10 Texas. In *Alexander*, the court held an evidentiary hearing during which Dr. Lehmann
11 and Bard's Assistant General Counsel, Donna Passero, testified. The witnesses testified
12 and were cross-examined about the creation and contents of Dr. Lehmann's report; Dr.
13 Lehmann's retention to prepare the report; adverse events that Bard was receiving
14 throughout 2004; other reports that Bard was preparing concerning adverse events in
15 2004; and the contents of a bariatric surgeons panel in February 2005. Portions of the
16 questions to the witnesses, as well as the witnesses' testimony, concern material
17 potentially protected by the attorney-client privilege and/or work-product doctrine.
18 Accordingly, the *Alexander* court sealed the transcript of the evidentiary hearing, entered
19 an order pursuant to Federal Rule of Evidence 502(d) to protect against any waiver, and
20 subsequently entered an order that allows the parties to use the evidentiary hearing
21 transcript in other proceedings in which a Rule 502(d) order has been entered. *See* Mot.
22 and Doc. Tex. Or., *Alexander v. Bard*, June 26 and July 1, 2014, attached as Exhibit A.

23 3. The parties in the MDL believe that a sealed submission of the *Alexander*
24 evidentiary hearing transcript, as well as the exhibits submitted during the hearing, will
25 aid the Court in determining whether Dr. Lehmann's report is protected work product, and
26 the parties therefore jointly request that the Court enter an order pursuant to Federal Rule
27 of Evidence 502(d) that any disclosure of protected communications or work-product
28 material in conjunction with Bard's Motion regarding Dr. Lehmann's December 2004

1 report shall not constitute a waiver of any such protected communications or work
2 product.

3 4. Although counsel for the plaintiffs do not concede that material to be
4 submitted to the Court in conjunction with Bard's Motion is protected by the attorney-
5 client privilege or work-product doctrine, the plaintiffs agree that entering a Rule 502(d)
6 order is appropriate for the purposes of determining whether Dr. Lehmann's report is
7 protected work product.

8 5. For the foregoing reasons, good cause exists for entry of an order under
9 Federal Rule of Evidence 502(d) that provides that any disclosure of protected
10 communications or material shall not constitute a waiver of such protection. Such an
11 order would appropriately protect the attorney-client privilege and work-product doctrine,
12 and the parties have jointly filed a Proposed Consent Order for the Court's consideration.

13 DATED this 19th day of November, 2015.

14 GALLAGHER & KENNEDY, P.A.

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CERTIFICATE OF SERVICE

I hereby certify that on November 19, 2015, the foregoing was electronically filed with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to all attorneys of record.

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